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No. 04-1140

IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,
Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah Corporation, and CENTURY NATIONAL INSURANCE CORPORATION, a California Corporation,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners respectfully submit this Reply in support of their Petition for Writ of Certiorari. Despite Respondents' contentions, it is clear that (1) there is a split in the Circuits that fosters and permits an even wider divergence in the District Courts on the issue presented; (2) the split in lower court authority is worthy of this Court's review; (3) Petitioners' proposed resolution of the issue presented has substantial merit; and (4) this case is a perfect vehicle for resolving the issue.

1. There is a split in the Circuits that fosters and permits an even wider divergence in the District Courts on the issue presented.

On the question presented—what legal standard governs the decision whether to award fees and expenses under 28

U.S.C. § 1447(c) upon remanding a removed case to state court—there is indeed a split in the Circuits giving rise to an even wider divergence in the District Courts. Respondents' attempt to minimize the split is unavailing.

In the Circuits, the split is plain. The Fifth Circuit will not allow a fee award if there was a reasonable argument in favor of the removal. *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004). This is essentially the *Christiansburg Garment* standard.[1] The Third Circuit may agree, as shown in the Petition. Other Circuits including the Ninth and Tenth starkly disagree, and allow a fee award even if there was a reasonable argument in favor of the removal. *Martin v. Franklin Capital*, 393 F.3d 1143, 1147 n.3 (10th Cir. 2004) ("[I]n the Ninth Circuit, as in our circuit, if defendant's removal position is objectively reasonable under the law, the district court may, in its discretion, either award attorney's fees to the plaintiff or decline to award fees."). The Seventh Circuit even has an express presumption in favor of a fee award when a case is remanded. *Hart v. Wal-Mart Stores*, 360 F.3d 674, 678 (7th Cir. 2004).

In the Circuits that allow a fee award even in the face of a reasonable argument for removal, some District Judges do utilize that authority, while others do not. It may be true, as Respondents say, that most District Judges deny fees when there was a reasonable basis for removal. But others grant fees in the face of such a showing, as demonstrated in the Petition. And there is no way of getting a clear picture of how many District Judges fall into either camp, given the haphazard publishing patterns of District Court decisions.

The lower courts are therefore all over the map, from a *Piggie Park*[2] standard to a *Christiansburg Garment* standard, as shown in the Petition.

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[1] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)

[2] *Newman v. Piggie Park Enterp.*, 390 U.S. 400 (1968)

2. The split in lower court authority is worthy of this Court's review.

Respondents further try to minimize the importance of this split, but again this effort fails. Contrary to Respondents' argument, litigants even in a single Circuit (except for the Fifth) cannot now know what standard will be applied, and so cannot even conform their removals to the applicable Circuit's law. Furthermore, the need for a uniform national standard in this case is just as great as with any such issue. One could have said, with just as much force as Respondents' attempt to minimize the importance of a national standard here, that the issue of supplemental jurisdiction over added parties is not worthy of a national standard. But this Court's grant of review in *Exxon Mobil Corp. v. Allapattah Services*, No. 04-70 and *Ortega v. Starkist Foods*, No. 04-79, shows the error of such an argument. Matters such as this, setting fundamental rules for the exercise of federal court jurisdiction, truly should be governed by a uniform standard.

Moreover, choice of the standard will matter. In arguing that a decision by this Court would affect few cases, Respondents implicitly assume away the possibility that this Court would adopt Petitioners' proposed standard: that the existence of a reasonable argument for removal is *not* a valid basis for denying fees. But if this Court did adopt that standard, it is self-evident that the impact on the number of removals, and on the number of successful challenges to questionable removals, would be substantial for the reasons explained in the Petition.

3. Petitioners' proposed resolution of the issue has substantial merit.

The answer to the question presented will come, primarily, through understanding of the reasons for the Congressional enactment of the fee-shifting provision in § 1447(c). That has been the main factor in this Court's decision as to analo-

gous questions in *Piggie Park*, *Christiansburg Garment*, and *Fogerty v. Fantasy*,[3] as shown in the Petition.

The adoption of a *Christiansburg Garment*-like standard is inconsistent with the Congressional action. In arguing to the contrary, Respondents' core contention is that the fee-shifting language of § 1447(c) was not added in order to reduce wrongful removals. (Brief in Opposition, pp. 11-12). They describe it simply as a replacement for the "bond" provision that had existed under former law.

Even if Respondents were correct, this would not justify adoption of the *Christiansburg Garment*-like standard that was used in this case and is mandated by the Fifth Circuit. That standard is appropriate where, as in *Christiansburg Garment* itself, there is reason to believe that the Congress affirmatively wanted to foster the class of litigation behavior that is potentially subject to fees. But not even Respondents contend that the Congress affirmatively wanted defendants to have room to be creative and aggressive in removing cases, or that Congress wanted to reduce the deterrence of such creativity and aggressiveness.

But furthermore Respondents' analysis of the Congressional purpose is not correct. To the contrary, the fee-shifting provision of § 1447(c) was part and parcel of an Act of which the overall purpose was "to reduce substantially the diversity jurisdiction of the federal courts." *Tank v. Chorister*, 160 F.3d 597, 599 (10th Cir. 1998). And if Congress had wanted to keep the standard the same as it had been, it would have enacted no fee-shifting language at all; there was none in the old statute, and that is why fees had previously been awarded, if at all, only under the equitable "bad faith" exception to the American Rule. *See, e.g., Balcorta v. Twentieth-Century Fox*, 208 F.3d 1102, 1106 n.6 (9th Cir. 2000). The very adoption

[3] *Fogerty v. Fantasy*, 510 U.S. 517 (1994)

of fee-shifting language is itself proof that the Congress intended to increase the availability of fees, as part of the Act's overall scope and purpose of reducing docket congestion in federal courts.

Thus the Congress clearly meant for § 1447(c) to deter more removals and to foster more challenges to questionable removals. Congress must have had in mind that this Court would read its use of the word "may" more like the way that word was read in *Piggie Park*, and not the way that it was read in *Christiansburg Garment*. There is certainly no reason to infer that, unlike the Congressional intent that this Court has found under other fee-shifting statutes, the Congress meant for each court to be able to decide, on a case-by-case basis, whether to apply the *Piggie Park* rule or the *Christiansburg Garment* one.

4. This case is a perfect vehicle for resolving the issue.

Finally, this case squarely presents the issue and focuses directly on the true heart of the matter. The only things that Respondents say about this case in particular are all reducible to the single point that there was, at the time of removal, a reasonable argument in favor of removal. That was the reason fees were denied, and the reason that denial was affirmed. This case therefore presents, more starkly than any other, the bottom-line question that makes this case very important. Should, and can, a District Court use a *Christiansburg Garment*-like standard for fee awards under 28 U.S.C. § 1447(c)? This case will answer that question.

CONCLUSION

For the reasons stated herein and in the Petition, the Petition should be granted.

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